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No. 00-525

In the Supreme Court of the United States

CHARLES J. ACKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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6 pp

QUESTION PRESENTED

Whether the use of thermal imaging to record the amount of heat emanating from a house constitutes a "search" within the meaning of the Fourth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 219 F.3d 602.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2000. The petition for a writ of certiorari was filed on October 4, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States District Court for the Western District of Wisconsin found that a residence owned by petitioner was being used to facilitate drug trafficking crimes and ordered the residence forfeited to the

United States pursuant to 21 U.S.C. 881(a)(7). The court of appeals affirmed. Pet. App. 1a-6a.

1. In late 1997, the Deputy Sheriff of Richland County, Wisconsin, Rick Wickland, received a tip from two informants that petitioner was selling large quantities of marijuana. After confirming petitioner's address, Wickland obtained copies of petitioner's electric bills and discovered high usage, which is consistent with indoor cultivation of marijuana. In March 1998, Wisconsin Department of Narcotics Enforcement Agent Peter Thelen scanned petitioner's house using a SEEKIR Thermal Imager. Thelen performed the scan from a public road and from the field adjacent to petitioner's house. The imager showed that large amounts of heat were being vented from the northeast and southeast corners of the basement, and that there was an unexplained heat source under the porch. Pet. App. 2a-3a.

Based on the two tips, the utility bills, and the thermal scan, Agent Wickland obtained a search warrant for petitioner's residence. During the search, agents found packaged marijuana, a triple beam scale, live marijuana plants, 1000 watt lights, box fans, and other materials consistent with a marijuana growing operation. The basement had three separate "grow" areas, two of which had exhaust fans that were connected to ducts that vented out the northeast corner of the house. Petitioner, who was present during the search, confessed to growing marijuana. Pet. App. 3a.

The United States filed a civil action seeking forfeiture of petitioner's house pursuant to 21 U.S.C. 881(a)(7), which provides for the forfeiture of real property used to facilitate a federal drug trafficking crime. Petitioner filed a claim to the property. He also filed a motion to suppress both the thermal imaging

evidence and the items seized pursuant to the warrant, on the ground that the use of a thermal imager constituted a search in violation of the Fourth Amendment and that the evidence seized was a fruit of that violation. He also filed a motion to dismiss the complaint. Pet. App. 3a-4a.

Relying on *United States* v. *Myers*, 46 F.3d 668 (7th Cir. 1995), cert. denied, 516 U.S. 879 (1995), the district court held that use of the thermal imager did not constitute a search. The district court then granted the government's motion for summary judgment and ordered petitioner's property forfeited. Pet. App. 2a, 6a.

2. The court of appeals affirmed. Pet. App. 1a-6a. Relying on *Myers*, the court held that use of the thermal imager did not constitute a search for Fourth Amendment purposes. *Id.* at 4a-6a. The court explained that, like the defendant in *Myers*, petitioner did not have an expectation of privacy in the heat emitted from his house, and that even if he did, it was not one that society would recognize as reasonable. *Id.* at 4a-5a. The court noted that in *Myers*, it had found that the imaging scanner used there, an Agema 210, is not capable of transmitting images of human activity inside the house. *Id.* at 4a. The court also found no evidence that the SEEKIR Thermal Imager is capable of producing such images. *Ibid.*

The court of appeals rejected petitioner's contention that the district court had erred in denying him an evidentiary hearing in order to explore whether the capabilities of the SEEKIR Imager exceed those of the Agema 210. Pet. App. 5a. "If [petitioner] had wanted to pursue" that course, the court explained, "he should have proffered evidence suggesting that the capabilities of the SEEKIR were sufficiently better than those

of the device in *Myers* such that the Fourth Amendment analysis would be affected." *Ibid.* Because petitioner had not proffered such evidence, the court found his suggestion that such evidence might exist "sheer speculation." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 7-11) that the use of a thermal imager to scan his house constituted an illegal search under the Fourth Amendment. In *Kyllo* v. *United States*, cert. granted, 121 S. Ct. 29 (2000), this Court granted certiorari to decide "whether the warrantless use of a thermal imaging device to detect heat sources within a home constitutes an unreasonable search and seizure under the Fourth Amendment to the United States Constitution." Pet. i. Accordingly, the Court should hold the petition in this case pending the decision in *Kyllo* and dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending resolution of *Kyllo* v. *United States*, No. 99-8508, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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